

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ROBERT LUNDVALL,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB No. 86-91

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

THIS MATTER, the appeal from Department of Ecology Notice of \$500 Penalty Incurred and Due No. DE 86-289 came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk (presiding), and Wick Dufford, at a formal hearing in Mount Vernon, Washington, on September 23, 1986.

Appellant appeared by his attorney Warren Gilbert; respondent appeared by Lee Rees, Assistant Attorney General. Reporter Debra Rietfort recorded the proceedings.

1 Witnesses were sworn and testified. Exhibits were examined. From
2 testimony heard and exhibits examined, the Board makes these

3 FINDINGS OF FACT

4 I

5 Appellant Robert Lundvall owns a dairy farm in Skagit County, just
6 East of the town of Mt. Vernon. Lundvall has continuously operated the
7 dairy farm since 1966. In recent years the neighborhood has been
8 changing under the impact of urbanization.

9 II

10 Respondent Department of Ecology (DOE) is a state agency charged
11 with the administration and enforcement of the State's Water Pollution
12 Control law, chapter 90.48 RCW.

13 III

14 Lundvall's dairy farm is located close to Barney Lake, a part of
15 the drainage of Nookachamps Creek which empties into the Skagit River.
16 The Nookachamps system supports valuable fish habitat. Its waters are
17 among these diverted downstream for municipal supply.

18 IV

19 On February 26, 1986, an inspection at the Lundvall farm revealed
20 that lagooned animal waste was being discharged through a hose into a
21 runoff water path flowing downslope into Barney Lake. Samples of the
22 water taken at the end of the hose, on analysis, showed a fecal
23 coliform count of eleven-million colonies per 100 milliliters. This
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1 was extraordinarily polluted water, thousands of times exceeding the
2 most liberal water quality standard of Chapter 173-201 WAC.

3 V

4 DOE's inspector is a man of considerable experience with water
5 pollution problems and with enforcement of the water pollution control
6 laws. He has conducted hundreds of dairy inspections.

7 The high coliform counts in the samples he took confirmed the
8 presence of manure flowing from the outlet hose - a condition he could
9 readily detect with the naked eye from the discoloration of the
10 discharge.

11 Nothing impeded the flow of the waste from its discharge from the
12 hose to the lake, perhaps a quarter - mile distant. It joined with
13 other runoff, following a discernable and defined course. We find
14 that polluted waste water was entering surface waters and ultimately
15 flowing into the lake.

16 VI

17 On several occasions over the last half-dozen years or so, the DOE
18 discussed with Lundvall the need to control discharges of animal
19 wastes from his dairy farm. In February, 1985, a year before the
20 event at issue, the same DOE inspector wrote to Lundvall, following a
21 visit to his farm, and advised that unless steps were taken to
22 eliminate the discharge of wastes to state waters, monetary penalties
23 would be imposed.

1 In response to this letter, Lundvall installed the large waste
2 lagoon which was the source of the February, 1986, discharge. The
3 system contemplated - one common in the dairy industry - was a "zero
4 discharge" system, involving the periodic pump-out of the lagoon with
5 the wastes either being sprayed over fields or hauled-away.

6 However, in constructing his lagoon on sloping ground, Mr.
7 Lundvall did not provide an uphill dike sufficient to divert run off
8 water from flowing into the lagoon.

9 VII

10 The days before DOE's inspection on February 26, 1986, were days
11 of heavy rainfall. The pump ordinarily used for the lagoon was,
12 during this time, out of service. Inevitably this combination of
13 factors led to the lagoon's filling up. The discharge hose was placed
14 in a lower corner of the lagoon as a temporary expedient to prevent a
15 breaching of its downhill bank.

16 VIII

17 On March 28, 1986, DOE issued Notice of Penalty incurred and due
18 No. DE 86-289. This penalty in pertinent part provided:

19
20 Notice is hereby given that you have incurred, and
21 there is now due from you, a penalty in the amount of
\$500 under the provisions of RCW 90.48.144.

22 On February 26, 1986, Department of Ecology staff
23 visited the dairy farm operated by Robert Lundvall and
24 observed a waste lagoon overflowing into a hose which was
25 directed into a drainage tributary to Barney Lake.
26 This discharge into state waters constitutes violation
27 of RCW 90.48.080.

IX

On April 9, 1986, Mr. Lundvall applied to the Department of Ecology for a relief from the penalty. On May 30, 1986, the Department of Ecology denied relief.

Feeling aggrieved by this decision appellant appealed to this Board on June 5, 1986.

X

Liquid cow manure, such as that discharged by appellant's operation, tends to render waters harmful, both because of its effect on dissolved oxygen levels and because of its potential pathogenic properties.

XI

Appellant's defense rests primarily on his assertion that the discharge was a one time occurrence caused by the heavy rains. Since the incident in question he has installed an uphill dike so that now rain water is diverted away from the lagoon. There is no evidence that any violations have occurred since the date in question.

XII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these matters and these parties.

Chapter 90.48 RCW, Chapter 43.21B RCW.

II

"Waters of the state", as defined by RCW 90.48.020:

shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and water courses within the jurisdiction of the State of Washington. (Emphasis added).

We conclude that Lundvall's discharge of wastes on February 26, 1986, was to waters of the state. See CH2O v. DOE, PCHB 84-182, 85-66 (December 31, 1985); Delbert Meyer v. DOE, PCHB 83-13 (May 3, 1985).

III

RCW 90.48.080 states:

It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the [DOE], as provided in this chapter. (Emphasis added).

IV

"Pollution" is defined in RCW 90.48.020 to include alteration of waters of the state in such a way as "is likely to . . . render such wastes harmful" in some way. Thus, the word is described in terms of the detrimental potential of discharges. It is not necessary that harm itself be shown in any case.

V

On the record before us, we conclude that the discharge from the appellant's manure lagoon on February 26, 1986, was such as to "tend

1 to cause pollution". We hold, therefore, that the discharge violated
2 RCW 90. 48.080.

3 VI

4 RCW 90.48.144 authorizes the issuance of a penalty for the
5 violation of RCW 90.48.080 of "up to ten thousand dollars a day for
6 every such violation". The statutory ceiling on this penalty was
7 raised as recently as 1985, reflecting a legislative intention to
8 treat actions contravening the water pollution control statute with
9 increased seriousness. Section 2, Chapter 316, Laws of 1985.

10 VII

11 The principal purpose of civil penalties is to influence behavior
12 and to deter future violations both by the perpetrator and by others
13 in the same occupation.

14 Here, in light of the range of possible penalties, the amount
15 selected appears to us in keeping with the statutory aims and
16 reasonable for a first cited offense. The history of efforts to
17 secure waste discharge control prior to imposing any sanction upon
18 appellant reinforces this conclusion.

19 VIII

20 Any Finding of Fact which should be deemed a Conclusion of Law is
21 hereby adopted as such.

22 From these Conclusions the Board enters this
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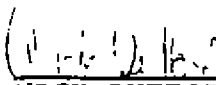
ORDER

Department of Ecology Notice of Penalty Incurred and Due No. DE
86-289 assessing a penalty of \$500 is affirmed.

DATED this 19th day of February, 1987.

POLLUTION CONTROL HEARINGS BOARD

 2/19/87
LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Lawyer Member

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